

September 23, 2021

Defense Acquisition Regulations System  
Attn: Ms. Carrie Moore  
OUSD(A&S) DPC / DARS

SUBJECT: Early Engagement Opportunity: E.O. 14042

Dear Ms. Moore:

On behalf of the member companies of the Professional Services Council (PSC), I am pleased to provide brief comments on the recent notice of *Early Engagement Opportunity of Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors*, which was published in the [Federal Register](#) on September 17, 2021. Signed by President Biden on September 9, 2021, Executive Order 14042 aims to “promote economy and efficiency in Federal procurement by ensuring that the parties that contract with the Federal Government provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument... [to] decrease the spread of COVID-19... decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government.”

PSC is generally supportive of these objectives and welcomes the opportunity to engage with the Department of Defense (DoD) and other U.S. Government (USG) agencies as they begin to implement this Executive Order. There are four principles that guide PSC’s perspective regarding COVID safety protocols for federal contractors:

- (1) **We support vaccinations as part of a broader approach** (i.e., inclusive of testing, masking, distancing, care and treatment, etc.) to controlling the spread of COVID-19.
- (2) **The USG should make every effort to provide for equal treatment across the federal workforce**—both civilian employees and on-site contractor employees. Equal treatment with consistent, similar rules and procedures enables people to work together in a safer environment.
- (3) **It is important for the USG to establish rules and procedures** for federal contractors that enable companies to recruit, train, promote, and retain the workforce needed to support government missions and functions.
- (4) **Rules and procedures should foster and support a level playing field** for contractors to bid, win, and perform on U.S. Government contracts. Inconsistently-applied rules and procedures—especially those that require some contractors to mandate vaccines while others are excluded from the mandate—would penalize companies for which a vaccination mandate is required.

Specific to DoD’s request for early engagement, PSC notes the Executive Order states that (1) the Safer Federal Workforce Task Force will provide “guidance for contractor or subcontractor workplace locations.... in which an individual is working on or in connection with a Federal

Government contract or contract-like instrument” and (2) the Federal Acquisition Regulatory Council will amend the Federal Acquisition Regulations (FAR) to provide for inclusion of a contract clause that reflects this guidance. Toward that end, PSC would like to highlight several areas for which USG guidance is necessary, and that guidance should consider the following.

### **Guidance and Protocols**

- There should be definitions for all bolded terms below, in a manner that can be modified as health and safety protocols evolve, as well as guidance on the specific questions related thereto:
  - **Fully vaccinated.** Also, how—and how quickly—will this term’s definition change to reflect changes in Centers for Disease Control and Prevention (CDC) guidance? What will be acceptable as proof of vaccination? How long will employees have to be fully vaccinated?
  - **Covered workers.** Also, will guidance and clauses as described above apply only to those contractor and subcontractor employees working on or in connection with a federal contract or also “back-office” support (G&A, OH staff)? How might requirements apply to services under contract to the contractor but not in connection with a federal contract? (e.g., custodial type contractors or other contracted labor working onsite, onsite but outsourced like guards or cafeteria workers, intermittent or periodic workers like construction)
  - **Paid time off for vaccination.** Please also address a scenario in which an unvaccinated individual gets vaccinated but then contracts COVID-19 (i.e., a so-called “breakthrough” case); will the employer be responsible to provide sick leave? If so, will the USG reimburse the employer for the cost of providing sick leave to this individual? Understanding that employers will be required to provide paid time off for an employee’s vaccination(s) and recovery associated with vaccine after-effects, how should an employer address these costs? What documentation is required to ensure that the employee is getting vaccinated and requires time to recover from the vaccination? What period of time does the USG set as the time period for recovering from vaccination after-effects? What consideration is given to longer-term recovery needs from vaccination after-effects? Separate DoD guidance states that DoD components will undertake to provide COVID-19 testing similar to that offered to DoD civilian employees at DoD component’s expense and at no cost to the employee or their employer; will OMB adapt comparable guidance where costs of testing and time off getting tested will be at the U.S. Government’s expense?
  - **“Religious exception” and “medical exception”.** Also, will the guidance and clauses address exemptions, exceptions, or waivers for religious, medical, and/or disability accommodations—and will the U.S. Government provide guidance on who determines such exemptions, exceptions, or waivers? How might an employee request, obtain, and exercise a medical or religious waiver; is documentation required, and if so, what documentation is acceptable and by whom? Will that employee then be required to produce a COVID test result and, if so, with what

frequency and to whom? Would the employer be required to provide paid time off for that employee’s ongoing testing requirement, and who would pay for tests and time?

- **Testing.** Also, if an employee refuses to be vaccinated, will weekly (or other frequency) testing suffice? If an employee tests weekly, what documentation is required for record keeping? Will the employer be required to provide paid time off for testing? What tests will be acceptable? Will tests administered at home be acceptable? Who is responsible for paying for the test?
- **Production.** As used in section 5(b)(v)
- **Workplace location.** Does workplace location extend to employees working remotely (from home, a location not managed by their employer, a non-stationary location, etc.)? Does workplace location apply to contractor-owned or leased facilities?
- **“Direct” and “or in connection with”.**
- Please explain the protocol for visitors to a contractor facility. Will DoD guidance require guests to follow CDC guidance regarding distancing and masking? Will the guidance require vaccine attestation for guests or employees who fall outside of Executive Order 14042 (e.g., employees who work overseas and are visiting a U.S. facility; employees who typically only telecommute, etc.).
- Will Executive Order 14042 apply to employees who only telecommute or work remotely (i.e., do not seek or need access to a federal facility)?

### **Contracts**

- Since Executive Order 14042 requirements flow down to subcontractors, are there requirements to vet all potential teaming partners on proposals? And if so, how? Will such a requirement be part of the government evaluation criteria, and if so, how would it be evaluated?
- Similarly, on existing contracts, what are requirements to ensure or document compliance by subcontractors?
- If the clause is incorporated into a contract, do only the employees working on or in connection with that contract need to comply, or do all employees at the workplace location need to comply?
- It appears the Safer Federal Workforce Task Force will issue guidance by September 24 and federal agencies must “take steps” include a clause in most contracts by October 8. How does the U.S. Government plan to implement the new clause(s) into existing contracts.
- Will the new clauses impact work currently performed on or in connection with federal contracts?
- How will the guidance apply across the federal government (i.e., will guidance standardize department and agency implementation plans)?

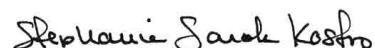
- Will there be a common standard of proof of vaccination for federal contractors across all department and agencies? Will such proof be required for entry to a government workplace? Will such proof be required for entry to a non-government workplace in which work is connected to a federal contract? Will such proof be required for federal contractors working remotely?

### **Other Issues**

- What are the rationales underpinning the lack of applicability for:
  - Grants;
  - Indian Tribes under the Indian Self-Determination and Education Assistance Act;
  - Contracts or subcontracts solely for the provision of products?
- Of note, this last exception—contracts or subcontracts solely for the provision of products—does not appear to consider that the vast majority of contract obligations (and the associated workforce) are in large, complex contracts that are rarely solicited solely as a “products” contract and that prime contractors do not often have subcontracts solely for “products” with no element of services. Note that neither the U.S. Government nor the bidding companies would know if vaccine requirements would apply to a specific solicitation until after the contract is awarded and signed. This would create confusion at best and would be fertile grounds for protests. How would the USG address these issues?
- Will companies that are subject to a vaccine mandate be indemnified against subsequent legal challenges?
- Will the exceptions in the Executive Order will penalize companies that are required to mandate vaccinations? (e.g., skilled, high-demand workers who wish to remain unvaccinated may leave for companies, including government contractors, that are exempt from mandates)

Thank you for your consideration of these comments. We hope the U.S. Government—through Safer Federal Workforce Task Force, FAR Council, and/or DoD documentation—will address the questions and issues raised above. PSC looks forward to continuing to work with you on these and other COVID-related topics that can better ensure the safety of the federal workforce. If you have questions, please contact me at (703) 875-8059 or [kostro@pscouncil.org](mailto:kostro@pscouncil.org).

Sincerely,



Stephanie Sanok Kostro  
Executive Vice President for Policy